No. 21,896

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEITH YAZZIE MANN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE APPELLEE

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I N D E X

ases Cited

tatutes Involved

Miscellaneous

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JURISDICTIONAL STATEMENT

This action was instituted by appellant in the District Court December 22, 1966, under the Federal Tort Claims Act, 28 U.S.C. 46(b), 2671 et seq., to recover damages for personal injuries stained on April 9, 1960 (R. 1-4). The District Court granted e Government's motion to dismiss, based on the 2 years' limi- tion in the Tort Claims Act, 28 U.S.C. 2401(b) (R. 17).

This Court has jurisdiction of the appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

Appellant was born in Arizona about 23 years ago and is an Indian of the Navajo tribe (R. 2, 16). On December 22, 1966, he filed the present suit against the United States under the Federa Tort Claims Act, seeking damages for injuries sustained on April 9, 1960, at age 16, while he was a student at an Indian School in Utah administered by the Bureau of Indian Affairs.

The United States moved to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure, pointing out that the action was barred because of the two-year limitation period prescribed by the Tort Claims Act. 28 U.S.C. 2401(b). Appellant opposed the motion on the ground that "being an Indian" he was entitled to a "more liberal interpretation" of the law (R. 11).

On February 20, 1967, the district court granted the Government's motion and dismissed the action (R. 17). This appeal followed (R. 18).

STATUTES INVOLVED

28 U.S.C. 1346(b) provides in pertinent part:

> (b) Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2401(b) provides in pertinent part:

> (b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later . . .
>
> * * *

ARGUMENT

SINCE APPELLANT'S ACTION UNDER THE FEDERAL TORT CLAIMS ACT WAS FILED MORE THAN TWO YEARS AFTER THE ACCRUAL OF HIS CLAIM, THE DISTRICT COURT HAD NO JURISDICTION TO ENTERTAIN THE SUIT.

It is settled that the United States may not be sued at all ıless Congress consents, and "the terms of this consent to be ıed in any court define that court's jurisdiction to entertain e suit." United States v. Sherwood, 312 U.S. 584, 586. Moreover, Congress prescribes a specific period within which a suit ainst the United States must be brought, that limitation is risdictional and "must be strictly observed and exceptions ereto are not to be implied." Soriano v. United States, 352 S. 270, 276. Indeed, the parties to a suit cannot waive risdictional limitations, and government officials cannot large the statutory time within which suit must be brought, even by their conduct they may have misled the other party to the it. Munro v. United States, 303 U.S. 36, 41; Pittman v. United ates, 341 F. 2d 739, 741 (C.A. 9), certiorari denied, 382 U.S. 1. [1]

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[1] The cited cases establish the lack of merit in appellant's "stoppel" argument.

In light of these principles, it is clear that the District Court had no jurisdiction to entertain appellant's suit which was brought more than six years after his claim accrued. For 28 U.S.C. 2401(b) [2/] expressly provides that a "tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues . . ." (Emphasis added.)

That two-year statute of limitations is jurisdictional. Humphreys v. United States, 272 F. 2d 411, 412 (C.A. 9). And, as this Court has squarely ruled, it is not tolled during a claimant's minority. Pittman v. United States, supra; Brown v. United States, 353 F. 2d 578 (C.A. 9). Accord: Simon v. United States, 244 F. 2d 703 (C.A. 5). For, the purpose of the statute of limitations is to protect the government from "difficulty in meeting stale claims." Pittman, supra at 741. See also Hearings on H. R. 7236 Before Subcommittee No. 1 of the House Committee on the Judiciary, 76th Cong., 3rd Sess., p. 21; H. Rep't. No. 1754, 80th Cong., 2d Sess. p. 4. The express statutory language, its underlying purpose and the relevant decisions call for an affirmance here of the ruling below that the government's consent to suit ended completely after the expiration of the two-year period of limitations.

2/ This provision was amended on July 18, 1966 [P. L. 89-506, § 7, 80 Stat. 307] to require that all tort claims be first presented for administrative action within two years of accrual of the claimant prior to commencement of suit. The 1966 amendment applies to claims accruing six months or more after the date of its enactment (80 Stat. 308), and hence is inapplicable to the present case.

Appellant seeks to escape from such an affirmance by arguing that limitation periods do not apply to Indians. The short and conclusive answer to this argument is that Congress has not provided Indians with such a special immunity in the Tort Claims Act and, as noted by the Supreme Court, such exceptions from the limitation period "are not to be implied". Soriano v. United States, 352 U.S. 270, 276.

The need for application of the foregoing principles here is emphasized by the fact that it is "now well settled by many decisions . . . [the Supreme] Court that a general statute in terms applying to all persons includes Indians and their property interests." Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 116. An Indian may not claim that he is not bound by the provisions of a general Act of Congress unless he can point to some express exclusionary provision in that Act or in some special treaty or other Act. Commissioner of Internal Revenue v. Walker, 326 F. 2d 261, 263 (C.A. 9). Indeed, when Congress has intended to exempt Indians from statutes of limitations, or to provide special and "fiduciary" handling of their legal affairs by the government, it has expressly so provided. See, e.g., 25 U.S.C. 70a; 372; United States Department of the Interior, Federal Indian Law, pp. 542-3. But Congress has not directed the government to deal differently with Indians with respect to the running of the limitation period in the Tort Claims Act.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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NOVEMBER 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William Kanter
WILLIAM KANTER

AFFIDAVIT OF SERVICE

STRICT OF COLUMBIA)
) ss.
TY OF WASHINGTON)

WILLIAM KANTER, being duly sworn, deposes and says:

That on November 8th, 1967, he caused three copies of the regoing brief for appellee to be served by air mail, postage epaid, upon counsel for appellant:

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bscribed and Sworn to before
this 8th day of November,
57.

eal]

Evaline Johnson
NOTARY PUBLIC

Commission expires April 14, 1972.